

**LFC Requester:****Caroline Malone**

**AGENCY BILL ANALYSIS  
2016 REGULAR SESSION**

**WITHIN 24 HOURS OF BILL POSTING, EMAIL ANALYSIS TO:**

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*{Include the bill no. in the email subject line, e.g., HB2, and only attach one bill analysis and related documentation per email message}*

**SECTION I: GENERAL INFORMATION**

*{Indicate if analysis is on an original bill, amendment, substitute or a correction of a previous bill}*

*Check all that apply:*

**Original**      X   **Amendment**            
**Correction**           **Substitute**          

**Date**    Jan. 19, 2015

**Bill No:**    HB 144

**Sponsor:**    Rep. Paul C. Bandy

**Agency Code:**    305

**Short**    Driver's License and

**Person Writing**    Brian Parrish

**Title:**    Real ID Compliance

**Phone:**    827-6624

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**SECTION II: FISCAL IMPACT**

**APPROPRIATION (dollars in thousands)**

Appropriation		Recurring or Nonrecurring	Fund Affected
FY16	FY17		

(Parenthesis ( ) Indicate Expenditure Decreases)

**REVENUE (dollars in thousands)**

Estimated Revenue			Recurring or Nonrecurring	Fund Affected
FY16	FY17	FY18		

(Parenthesis ( ) Indicate Expenditure Decreases)

**ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)**

	<b>FY16</b>	<b>FY17</b>	<b>FY18</b>	<b>3 Year Total Cost</b>	<b>Recurring or Nonrecurring</b>	<b>Fund Affected</b>
<b>Total</b>						

(Parenthesis ( ) Indicate Expenditure Decreases)

Duplicates/Conflicts with/Companion to/Relates to: HB 94, HB 99, HB 123  
Duplicates/Relates to Appropriation in the General Appropriation Act

**SECTION III: NARRATIVE**

**BILL SUMMARY**

This analysis is neither a formal Attorney General's Opinion nor an Attorney General's Advisory Letter. This is a staff analysis in response to an agency's, committee's, or legislator's request.

**Synopsis:**

House Bill 144 ("HB 144") amends the Motor Vehicle Code, NMSA 1978, Chap. 66, Art. 1 and 5, to purportedly create two classes of state-issued driver and identification documents— (1) those which comply with the requirements of the REAL ID Act of 2005 ("REAL ID") and (2) those that do not comply.

HB 144 amends the definitions under the Motor Vehicle Code, (1) to add a definition for a "driver's card" that means a document "not intended to be accepted...for official federal purposes" but that authorizes the operation of motor vehicles; (2) to modify the definition of "driver's license" to mean "a license or class of license that meets federal requirements to be accepted by federal agencies for official purposes"; (3) include the term "lawful status...as that phrase is used in [REAL ID]"; and (4) adjust the definition of "license."

HB 144 amends the application requirements for authorization to operate a motor vehicles (1) to include the category "driver's cards" (2) to allow for a "renewal" application; (3) to amend the information and documentation required for the application to be considered, approved, and the document issued; (4) to allow a person of lawful status to choose whether to apply for a driver's license or driver's card; (5) to permit the department to issue a driver's card where an applicant cannot provide proof of lawful status; and (6) to provide the proof of identity required for the issuance of a driver's card. Also, HB 144 provides for the issuance of a driver's card and prescribes the information required to be produced on the both driver's licenses and driver's cards. Further, HB 144 provides different expiration periods for a driver's license issued to a foreign national from a driver's license ostensibly not issued to a foreign national; and HB 144 provides expiration periods for driver's cards.

HB 144 also provides eligibility, application requirements, expiration periods, and prescribes the information required to be produced on any state-issued identification card. Finally, HB 144 establishes new penalties, both misdemeanor and felony level, for the unlawful use of driver's licenses, driver's cards, and identification cards.

HB 144 appears to require implementation within six month of its effective date.

## **FISCAL IMPLICATIONS**

None to this office.

## **SIGNIFICANT ISSUES**

HB 144 appears to be an effort to address the mandatory security standards required under the federal REAL ID Act for state-issued driver's licenses and identification that may be utilized to board airplanes, enter federal buildings, or for a range of other "official [federal] purposes." REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, 312 (May 11, 2005).

REAL ID requires that the United States Department of Homeland Security ("DHS") implement the Act; and although DHS has not fully implemented the Act at this time, full implementation of the law is scheduled for early 2018. Also, piecemeal implementation of the law in the interim is permitted (e.g., White Sands Missile Range no longer accepts New Mexico-issued licenses for access to that facility). Under REAL ID, states must comply with all substantive provisions of the federal law to achieve "full compliance." 6 C.F.R. § 37.51 (2015).

For a state-issued document to be acceptable for federal purposes, all REAL ID provisions must be satisfied. "Any driver's license or identification card issued by a State that DHS determines is not in full compliance...is not acceptable as identification by Federal agencies for official purposes." 6 C.F.R. § 37.65(a).

Section 3(B), p. 6, ln. 8–p. 7, ln. 20: It is unclear, but appears that this section may refer to the minimum documentation requirements that an applicant must provide—"shall provide documentation required by the federal government...", see 6 C.F.R. § 37.11(a)–(h) (2015), but it does not appear that all the minimum requirements are met under HB 144. 6 C.F.R. Section 37.11(a) mandates that each person applying for a REAL ID compliant ID must be subject to a "mandatory image capture" and that the state must "maintain photographs of individuals even if no card is issued...stored in a format in accordance with [REAL ID's source document retention requirements." Also, 6 C.F.R. Section 37.11(b) requires that "[e]ach applicant must sign a declaration under penalty of perjury that the information on the application is true and correct...." It is possible that these shortcomings could be clarified by regulation, but HB 144 contains no provision that complies with the federal mandate regarding the photograph and declaration that must be part of an application under REAL ID.

Section 3(B), p. 7, ln. 20–23: requires that "[t]he department shall verify the applicant's lawful status and social security number, if applicable through a method approved by the federal government." This appears to refer to the federal requirement of verification, see 6 C.F.R. Section 37.13, but Section 31.13 requires that "States verify the documents and information under § 31.11 with the issuer of the document." It is possible that these shortcomings could be clarified by regulation, but it does not appear that Section 3(B)'s verification complies with the mandate under REAL ID.

Section 3(E), p. 8, ln. 10–22: appears to provide for a determination of the period of time that a foreign national may be issued a REAL ID compliant driver's license, but HB 144 states that "provided that if [the duration of lawful status] cannot be determined by the department and the applicant is not a legal permanent resident, the license shall expire one year after the effective date of the license." This language is different from the federal regulations, which

states, ‘if there is no expiration date.’ See 6 C.F.R. § 37.21(b)(1). DHS could determine that “no expiration date” and “no date the department could determine” are not the same, and thus, the provision may not be compliant.

Section 4, p. 12, ln. 7–p. 13, ln. 2: prescribes the information required to be produced on the both driver’s licenses and driver’s cards, including in Subsection (D) that “[a] driver’s card shall bear the statement: FOR DRIVING ONLY. NOT VALID FOR FEDERAL IDENTIFICATION.” REAL ID allows that a state may issue “driver’s licenses and identification” that is not REAL ID compliant, but that those must “[c]learly state on their face and in the machine readable zone that the card is not acceptable for official purposes.” See 6 C.F.R. § 37.71(a)(1). HB 144 does not require the placement of its equivalent statement in both locations on the driver’s card (the non-REAL ID complaint document authorizing operation of a motor vehicle). Although Subsection (B) requires that the driver’s licenses be distinguishable in color and design, HB 144 does not require that driver’s licenses issued comply with the security features required for driver’s licenses under REAL ID. See 6 C.F.R. § 37.15. Also, HB 144 does not contain a provision that clearly requires that “machine readable technology” be part of the driver’s license, which is required under REAL ID. See 6 C.F.R. § 37.19.

Section 8, p. 19, ln. 3–p.20, ln. 14: provides application requirements for a state-issued identification card. It is not clear if the application requirements imposed by Section 8 comply with REAL ID for the same reasons stated in the discussions of Sections 3(B) and (E), see above.

Section 11, p. 23, ln. 9–p. 24, ln. 14: It is also not clear whether HB 144 authorizes the issuance of a REAL ID compliant identification card, because HB 144 does not require that identification cards issued comply with the security features required for identification cards under REAL ID. See 6 C.F.R. § 37.15. Also, HB 144 does not contain a provision that clearly requires that “machine readable technology” be part of the identification card, which is required under REAL ID. See 6 C.F.R. § 37.19.

Thus, it is unclear whether HB 144 provides for (1) two classes of identification cards (a REAL ID compliant and one that is not), (2) one class of REAL ID complaint identification cards, or (3) one class of identification cards that are not REAL ID compliant.

Although many of the issues may be within the Taxation and Revenue Department’s scope of rulemaking authority, more clarity within the text of the legislation could clarify the Legislature’s intent, minimize uncertainty, and provide clear authority to promulgate the necessary and appropriate regulations.

Also, it should be noted that REAL ID requires states to implement a security plan for state motor vehicle facilities. See 6 C.F.R. § 37.41. There is not mention of such a plan in HB 144.

## **PERFORMANCE IMPLICATIONS**

None for this office.

## **ADMINISTRATIVE IMPLICATIONS**

None for this office.

## **CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP**

HB 94, HB 99, HB 123 and HB 144 relate to the issuance of New Mexico Driver's Licenses and compliance with the Federal Real ID Act.

## **TECHNICAL ISSUES**

Section 3(B), p. 7, ln. 19–20: "...date of birth, social security number, if applicable, address of current residence and lawful status...." It is unclear what the phrase "if applicable" modifies in the sentence as written. It may be inferred that "if applicable" refers to "social security number" if the subsequent sentence in that subsection is used as a model for interpretation; but suggest editing for clarity. For example, if it does modify social security number: "...applicant's identity; date of birth; social security number, if applicable; address of current residence and lawful status..."

## **OTHER SUBSTANTIVE ISSUES**

HB 144 does not provide for an "exemption process for persons who, for reasons beyond their control, are unable to present all necessary documents [under 6 C.F.R. Section 37.11] and must rely on alternative documents to establish identity and day of birth." See 6 C.F.R § 37.11(h). This exemption process to demonstrate lawful status is only available to U.S. citizens, but without it a number of U.S. citizens and residents of New Mexico who currently possess identification that is recognized for official purposes could be denied a REAL ID compliant identification document under New Mexico law. This could raise an issue under the equal protection clauses of the New Mexico Constitution and United States Constitution. See N.M. Const. art. II, § 18; U.S. Const. amend. XIV

HB 144, Section 3(B), p. 7, ln. 12–16: provides that "[t]he secretary shall establish by regulation...evidence of residency." Depending on the requirements established, an issue could be raised under the equal protection clauses of the New Mexico Constitution and United States Constitution, if for example, the regulations created a situation where a foreign national who had previously been issued a New Mexico driver's license could not maintain that license because of a change in the residency requirements. See N.M. Const. art. II, § 18; U.S. Const. amend. XIV; see generally Alexander L. Mounts, Note, A Safer Nation? How Driver's License Restrictions Hurt Immigrants & Noncitizens, Not Terrorists, 37 Ind. L. Rev. 247 (2003). It is well-settled that non-citizens enjoy constitutionally-granted equal protection rights. See Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). In New Mexico, where the people are afforded heightened constitutional equal protection rights, disparate treatment of a disfavored group potentially gives rise to especially searching scrutiny by the judiciary. See, e.g., Breen v. Carlsbad Mun. Schools, 2005-NMSC-028, 138 N.M. 331. Courts skeptical of government actions which withdraw existing rights from such disfavored groups. See Romer v. Evans, 517 U.S. 620 (1996); Perry v. Brown, 671 F.3d 1052, 1079-1080 (9<sup>th</sup> Cir. 2012). If the courts of New Mexico or the United States find that legislation affronts basic constitutional protections, it will be invalidated. See, e.g., Griego v. Oliver, 2014-NMSC-003.

## **ALTERNATIVES**

None suggested.

## **WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL**

If New Mexico does not come into compliance with REAL ID, the state runs a high risk that it will be unable to issue New Mexico residents driver's licenses or identification cards that can be used for federal purposes. On the other hand, reportedly 25 States have enacted laws expressly prohibiting compliance with the REAL ID Act, so it may still be an open question as to when, and if so, how effectively, the federal government will proceed to enforce the REAL ID Act as currently provided.

## **AMENDMENTS**

None suggested.